BEFORE THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION FOR THE STATE OF ALASKA

FLINT HILLS RESOURCES ALASKA, LLC, Requestor, v. ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF SPILL PREVENTION AND RESPONSE, Respondent.	DEC File No. 100.38.090

FLINT HILLS RESOURCES' REPLY IN SUPPORT OF ITS REQUEST FOR AN ADJUDICATORY HEARING

The Division of Spill Prevention and Response ("the Division") opposes Flint Hills Resources Alaska, LLC ("Flint Hills") request for an adjudicatory hearing to address the Department of Environmental Conservation's ("DEC") November 27, 2013 final decision regarding the groundwater cleanup level for sulfolane. In its opposition brief, the Division concludes that this sulfolane cleanup level is correct because DEC regulations and guidance surrender DEC's decision-making authority over appropriate toxicity values to the United States Environmental Protection Agency ("EPA"). Alaska's regulations and statutes do not allow DEC to delegate its authority to EPA on this issue, as claimed by the Division. The Commissioner should require DEC to make an independent decision on the cleanup standard, through the adjudicatory hearing process, with a full review of the scientific evidence regarding the health risks of sulfolane in groundwater.

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The Division also objects to Flint Hills' hearing request because the Division claims that its decision on the groundwater cleanup level is not a "final department decision." The Division attempts to blur the finality of its groundwater cleanup decision by referring to other ongoing issues, but under applicable legal standards, there is no doubt that DEC has made a final department decision on the groundwater cleanup level.

I. DEC'S NOVEMBER 27, 2013 DECISION IS A FINAL DEPARTMENT DECISION

The Division's first argument is that DEC's November 27, 2013 letter does not constitute a "final department decision," and therefore the decision cannot be reviewed through an adjudicatory hearing request. The Division's argument largely ignores the relevant language of the November 27 letter, as well as the legal consequences and practical effect of the decisions stated in the letter.

The Division concludes that an appeal is premature because DEC's November 27 letter requires Flint Hills to submit a revised HHRA by March 28, 2014. This revised HHRA will be reviewed by DEC, which will then take final action to approve an HHRA. Apparently, the Division believes that a request for adjudicatory hearing on the sulfolane groundwater cleanup level must wait until these future events unfold.

In making this argument, the Division improperly recasts the scope of Flint Hills' request for hearing. Contrary to the Division's argument, this Request for Hearing is not directed at DEC's decisionmaking with respect to the HHRA as a whole. Flint Hills is challenging DEC's final decision to set a groundwater cleanup level for sulfolane of 14 ug/L, pursuant to 18 AAC 75.345(b)(2). The record leaves no doubt that DEC *has* made a final decision concerning the groundwater cleanup

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level.

The scope and finality of DEC's decision on the groundwater cleanup level is expressly stated in DEC's November 27, 2013 letter:

> In accordance with 18 AAC 75.345(b)(2), DEC finds that the groundwater alternative cleanup level for sulfolane derived in Chapter 5 [of the HHRA] of 14 ug/L based on the risk characterization in Chapter 3 is protective of human health, safety and welfare, and of the environment, and approves the HHRA subject to the following three conditions:[1]

Three conditions follow. Two conditions expressly reinforce the finality of DEC's decision on the groundwater cleanup level for sulfolane.

Condition No. 1 is that all materials supporting any different groundwater cleanup level must be deleted from the HHRA. Specifically, DEC states that it does not approve Chapter 4 of the HHRA--the portion of the HHRA that supported a different determination of the cleanup level for sulfolane.

> The approach taken in Chapter 4 . . . as well as its appendices . . . is not an approach authorized by DEC regulations or risk assessment guidance documents and is, therefore, not approved and should not be included in the HHRA.[2]

DEC also states that it approves only those portions of Chapter 5 of the HHRA that are consistent with this same cleanup level. And, Condition No. 1 restates that site determinations will be made based on Chapter 3 of the HHRA, which reflects the 14

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[1] FHRA Exhibit E at p. 1.

[2] FHRA Exhibit E at p. 1.

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ug/L groundwater cleanup level.

Condition 2 directs Flint Hills to make changes stated in a matrix that is attached to DEC's November 27 letter. These changes reinforce that DEC has made a final decision about the groundwater cleanup level. For example, Comment 29 states: "*The appropriate ACL for sulfolane in groundwater is 14 ug/L*, derived from the PPRTV RfD and the ADEC-approved exposure assumptions." (emphasis added). Comments 28, 29 and 40 direct Flint Hills to delete any contrary analysis from the HHRA. Similarly, in Comment 6, DEC states that its analysis "results in an ACL of 14 [ug/L] for sulfolane" and that "all references to a range of potential ACLs at the site must be removed. The ARCADIS Comparative Scenario, as presented in Chapter 4 of the HHRA, is not acceptable or approved by DEC."

In short, DEC's November 27 letter unequivocally adopts 14 ug/L as the groundwater cleanup level for sulfolane. The letter includes an express determination to this effect, it demands deletion of all contrary data from the HHRA in order to preclude further review or consideration, and it expressly disapproves and excludes all portions of the HHRA that propose or support any result other than 14 ug/L. The letter says nothing that holds out the slightest chance that another cleanup level will be considered, much less approved.

In support of its argument, the Division refers to Alaska case law defining "final agency action." This case law supports Flint Hills' contention that DEC's November 27 letter is a "final department decision." The recurring theme in Alaska case law is that the determination of when "final agency action" has occurred is a

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practical test.[3] The foregoing discussion demonstrates that even though the HHRA document as a whole must go through a final approval process, the Division has already made its final decision on the issue raised here, the groundwater cleanup level. As a practical matter, *this* issue has been decided.

Alaska case law also reflects that the core questions in determining whether agency action is final are whether the agency has completed its decision-making process, and whether the result of the process will directly affect the parties.[4] The foregoing discussion clearly demonstrates that DEC has completed its decision-making process on the groundwater cleanup level.

Lest there was any doubt on this point, DEC recently rejected Flint Hills' Site Characterization Reports for the sole reason that the Reports referred to a groundwater cleanup level for sulfolane that is different from the level that was "established" by DEC. In a December 26, 2013 email to Flint Hills, DEC stated:

> We have received the [Site Characterization] reports dated December 20, 2013, and noted that Flint Hills has used an alternate cleanup level (ACL) for sulfolane of 362 ppb. This is not an approved ACL therefore the [SCRs] are rejected as submitted. DEC requests that the reports be revised using *the established ACL of 14 ppb* by January 6, 2014. Failure to submit these revised reports will be considered as failure to submit the deliverables per DEC's communication from July 23, 2013.

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[3] *Crawford & Co. v. Baker-Withrow*, 81 P.3d 982, 985 (Alaska 2003); *State v. Meyer*, 906 P.2d 1365, 1370 (Alaska 1995).

[4] *Crawford*, 81 P.3d at 985; *Meyer*, 906 P.2d at 1370.

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(emphasis added).[5] DEC's December 26 decision demonstrates that the November 27 letter regarding the groundwater cleanup level has all the earmarks of a final decision under Alaska law. The "practical" finality of the November 27 decision is demonstrated by the fact that DEC is implementing the decision through subsequent actions. Decision-making on the sulfolane cleanup level is complete, as demonstrated by DEC's statement that the cleanup level of 14 ppb is "established." And DEC's determination is already affecting Flint Hills, because DEC rejected Flint Hills' Site Characterization reports based solely on the final determination of the sulfolane cleanup level set forth in DEC's November 27 letter.

The Division points to portions of the November 27th letter that discuss issues in the HHRA other than the sulfolane cleanup level, and asserts that these issues are still under consideration by DEC. But here the Division is being evasive. The HHRA addressed various issues concerning a proposed cleanup, and apparently DEC is interested in updated information that will enable it to address some of those issues. But DEC's November 27 letter and its December 26 email make it crystal clear that the groundwater cleanup level is not one of the issues that will be open for further discussion. The finality of DEC's decision is highlighted by DEC's firm directive to redact all information from the HHRA that would support any different outcome with respect to the groundwater cleanup level, and by DEC's threat of enforcement action if Flint Hills did not resubmit reports adopting DEC's cleanup level. And, in its

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[5] FHRA Ex. F (attached). DEC's July 25, 2013 letter to Flint Hills, referenced in the December 26, 2013 email, states: "Any further delays from the dates listed below will be determined to be a violation of 18 AAC 75.325 and may result in the issuance of a Notice of Violation or other appropriate enforcement action." FHRA Ex. D.

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opposition brief, the Division never says that DEC will consider adopting a different groundwater cleanup level for sulfolane. To the contrary, in Part V of its brief, the Division claims that the applicable regulations *required* DEC to choose this groundwater cleanup level, and gave it no option to accept anything else. Thus, the Division's own legal analysis forecloses any possibility that DEC will change its mind about the groundwater cleanup level when it receives a final HHRA.[6] The issue on appeal here--the groundwater cleanup level for sulfolane as determined under 18 AAC 75.345(b)(2)--is plainly closed to further consideration, and is subject to review now.[7]

The Division says that its position avoids "piecemeal" appeals. While that may be a worthy goal, it carries no weight here. As the foregoing discussion demonstrates, DEC has made its final decision on a specific regulatory issue, the groundwater cleanup level for sulfolane under 18 AAC 75.345(b)(2). This decision is appealable. It is not any less appealable simply because DEC has packaged this

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[6] DEC's November 27 letter explicitly states that the updated information it has requested for the final HHRA is not expected to change the site-specific cleanup level. FHRA Ex. E at 2.

[7] The Division's vague hints that the remainder of the HHRA process might yield a different outcome on the groundwater cleanup level (despite DEC's unequivocal statements demonstrating the finality of its decision on this issue) are reminiscent of EPA's arguments in *Sackett v. EPA*, 132 S.Ct. 1367 (2012). After EPA issued a compliance order to the Sacketts, EPA invited the Sacketts to "engage in informal discussion of the terms and requirements" of the order, and to inform EPA of allegations that they considered inaccurate. The U.S. Supreme Court summarily rejected the argument that these statements converted an otherwise final order into something else. *Id.* at 1372. The Commissioner should take a similar stance here. In addition, there are other indicia of finality present in *Sackett* that are also present here. In particular, DEC has threatened Flint Hills with enforcement if it fails to implement its November 27 decision.

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appealable issue with other decisions that it may make about the site, under the general rubric of an HHRA.[8]

As a practical consideration, it also bears asking what is gained for any party or the public by postponing review on the groundwater cleanup level for sulfolane. The Division's brief suggests a meaningless exercise that offers only delay in proceeding with final cleanup plans. As the Division would have it, on March 28, 2014, Flint Hills should submit a revised HHRA that deletes all references to, and scientific support for, any groundwater cleanup standard except the one that DEC has already decided to adopt. Then--with a report from Flint Hills in hand that only supports one result--DEC will approve the HHRA. Apparently Flint Hills then will be allowed to appeal from DEC's *approval* of the DEC-compliant HHRA that Flint Hills itself submitted.

As bizarre as this sequence would be, the Division apparently believes that it would produce a final decision that is subject to appeal as a "final decision" under DEC's regulations. But in the meantime, months will pass by, and we will end up right where we are now, with an unresolved dispute about the approved groundwater cleanup level for sulfolane. The delay in addressing this issue is not good for anyone. The Division's appeal scenario simply postpones the day when the approved groundwater cleanup level is finally resolved. Until then, the uncertainty with respect

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[8] Moreover, the Division's concern about piecemeal appeals rings hollow when viewed in light of its position on the stay requested by Flint Hills. Under the Division's view, Flint Hills should be required to continue working on, and submitting, various cleanup-related deliverables using the Division's cleanup level. The Division takes this position knowing that it will generate appeals at every step of the process.

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to the cleanup level will impede and indeed prevent all realistic and meaningful planning. More concerning, the harm to residents caused by DEC's premature decision on the cleanup standard, as discussed in Section V, will continue and worsen. Last, this unresolved issue puts Flint Hills in the position of generating more costly studies and documents that may be useless, because they are based on a cleanup level that is ultimately rejected.

II. DEC REGULATIONS DID NOT REQUIRE DEC TO USE TOXICITY VALUES DERIVED FROM EPA'S PPRTV AND TO REFUSE CONSIDERATION OF ALL OTHER SCIENTIFIC OPINION

A. Alaska's Regulations Do Not Require DEC to Use EPA's PPRTV to Determine the Groundwater Cleanup Level for Sulfolane

In Part V of its brief, the Division articulates its defense on the merits of Flint Hills' request. The Division's sole defense on the merits is that DEC was required to use EPA's PPRTV because DEC's regulations require it to do so. The Division implicitly concedes that if it is wrong about DEC's regulations, there is a basis for a hearing. Thus, the principal issue for the Commissioner to decide here is whether the Division has correctly interpreted the applicable Alaska regulations to conclude that DEC must use the EPA PPRTV as the sole basis for determining the groundwater cleanup level for sulfolane.[9]

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[9] In its "Background Facts," the Division refers to two "Health Consultation" reports issued by the federal Agency for Toxic Substances and Disease Registry (ATSDR) setting a "public health action level" for sulfolane. (Exs. 2 and 3 to the Division's brief). The Division omits important information about the meaning of public health action levels in ATSDR's reports. As stated in the 2010 ATSDR Consultation, a public health action level is a "non-regulatory level set to identify if human exposure to that water *needs to be evaluated further (a/k/a, a screening level)*." 2010 ATSDR (DEC Ex. 2) at p. 1 (emphasis added). This type of level "is intended to serve *only as a screening tool* to help decide whether to evaluate more closely exposures to a substance found at a site." 2011 ATSDR Consultation (DEC Ex. 3) at p. 7 (emphasis

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The Division's arguments focus on the process that DEC followed, not the merits of the groundwater cleanup level chosen by DEC, and therefore Flint Hills' reply takes a similar focus. This focus should not obscure that the analysis that led to a 14 ug/L groundwater cleanup level is seriously flawed, that DEC made the decision without even considering the detailed and high-quality science presented by Flint Hills and ARCADIS, and that other regulators and scientists have reached conclusions about sulfolane toxicity and safe groundwater levels that are consistent with the groundwater cleanup levels proposed by Flint Hills. See Flint Hills' Request for Hearing Opening Brief at pp. 16-30.

The primary regulation in question is 18 AAC 75.345(b)(2). It states that contaminated groundwater must meet an approved cleanup level based on an approved site-specific risk assessment conducted under the *Risk Assessment Procedures Manual* adopted by reference in 18 AAC 75.340. 18 AAC 75.340, in turn, adopts the department's *Risk Assessment Procedures Manual*, dated June 8, 2000 ("the 2000 Manual"). 18 AAC 75.340(f).

In its July 19, 2012 letter, DEC did not rely on the 2000 Manual specified by its own regulation, but instead relied on a 2011 draft Manual. DEC's November 27, 2013 letter offered no new analysis and stated no different basis for DEC's final decision. The Division's brief glosses over this fact, and effectively concedes that DEC's reliance on the Draft 2011 Manual was wrong. The Division quickly shifts to trying to explain why DEC's decision *would have been* correct if it *had* relied on the

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added). ATSDR expressly distinguished this purpose from a Risk Based Concentration, which is meant to be used to focus site-based investigation and risk assessment and could inform the development of a cleanup plan. *Id.*

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applicable 2000 Manual, as required by its own regulations. The Division's nimble shift should not obscure the fact that DEC made its decision here on the basis of a Risk Assessment Manual that does not apply, and its decision should be reversed on this basis alone.[10]

Even if DEC had relied on its 2000 Manual, the Division is wrong when it claims that the 2000 Manual required it to use the EPA's PPRTV as the sole basis for setting a groundwater cleanup value. Although the Division claims that DEC's path to sole reliance on the EPA's PPRTV was "short and straight,"[11] the Division's explanation demonstrates exactly the opposite. The Division takes four pages to describe a convoluted trail that ends with its reliance on EPA's PPRTV as the sole source for setting one of the key factors (the toxicity value) for determining the groundwater cleanup level--a result that is expressly prohibited by AS 44.62.245, discussed below.[12]

As required by its own regulation, the Division's starting point is the text of the

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[10] *See SEC v. Chenery Corp.*, 332 U.S. 80, 92-5, 63 S.Ct. 454, 462 (1943) (agency decisions are to be adjudged on the grounds invoked by the agency at the time of the decision, not by the agency's post-hoc rationalization for the decision).

[11] Opposition Brief at 24.

[12] In the approved Work Plan for the draft HHRA (December 2011), DEC did not take the position that its decision on a groundwater cleanup level would be governed by a PPRTV to the exclusion of other scientific data. The Work Plan stated that the draft HHRA would "evaluate" the toxicity value derived by EPA, but toxicity criteria for sulfolane developed by other reputable entities would also be evaluated. Second Revision, Work Plan to Conduct a [HHRA], December 2011, at pp. 36-37. (Ex. 6 to the Division's brief). DEC apparently came to its current view at some later date, and finalized that view in the November 27 letter.

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2000 Manual.[13] See 18 AAC 75.345(b)(2). Paragraph 3.2.1 of the 2000 Manual includes a hierarchy of sources for reference in selecting toxicity criteria. The Division concedes that EPA PPRTVs are not listed in the hierarchy of choices that is described in section 3.2.1. Thus, on its face the relevant Manual--the 2000 Manual that is specified for use by 18 AAC 75.345(b)(2)-- did not require DEC to use EPA's PPRTV values to determine the groundwater cleanup level. The Division also concedes that Items 1-3 in the 2000 Manual's hierarchy are not applicable here, because none of these sources provide a toxicity value for sulfolane. Thus, the Division turns to Item 4 in the hierarchy, which is "other professionally peer-reviewed documents . . . as needed and as approved by ADEC on a case-by-case basis."

The Division implicitly concedes that Item 4 in the 2000 Manual's hierarchy also did not *require* the Division to adopt EPA's PPRTV as the sole basis for determining the toxicity value for sulfolane. The language of Item 4 is entirely permissive and discretionary, as it allows DEC to refer to professionally peer-reviewed documents "as needed" and "as approved on a case-by-case basis."[14]

To reach the conclusion that it was *required* to use the EPA PPRTV value here,

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[13] Ex. 12 to the Division's brief.

[14] In support of the alternative approach presented in the HHRA, ARCADIS referred to analysis of sulfolane toxicity by ToxStrategies. Like ARCADIS, ToxStrategies concluded that the toxicity value for sulfolane is .01 (compared to EPA's .001). ToxStrategies' analysis was published in a peer-reviewed article, Thompson, C.M., et al., Development of a Chronic Noncancer Oral Reference Dose and Drinking Water Screening Level for Sulfolane Using Benchmark Dose Modeling. Journal of Applied Toxicology. This article was published online in August 2012, [onlinelibrary.wiley.com]. doi: 10.1002/jat.2799, and in print at 33 Journal of Applied Technology 1395 (Dec. 2013). See http://onlinelibrary.wiley.com/doi/10.1002/jat.2799/abstract.

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the Division takes the following circuitous route: 1) the Division asserts that "Alaska follows EPA guidance" in conducting human health risk assessments;[15] 2) in 2000 the Division said that it followed EPA's 1989 "Risk Assessment Guidance for Superfund Volume I, Part A" and 3) in 2003, EPA issued an new EPA Directive that changed EPA's 1989 Guidance, by referring to EPA PPRTVs as a source for peer reviewed values. Based on these assertions, the Division concludes that it must use the EPA's PPRTV as the sole basis for to determine the toxicity value for sulfolane. But each step in the Division's progression is flawed, and so is its conclusion.

First, contrary to the Division's statement in its brief, DEC's 2000 Manual does not say that DEC "follows EPA guidance" in conducting human health risk assessments. In support of this statement, the Division quotes Paragraph 1.1 of the 2000 Manual, but Paragraph 1.1 only says that the DEC Manual "is not meant to replace" regional or national EPA guidance on risk assessment. From a regulatory standpoint, that is very different from saying that DEC will "follow" EPA guidance that is otherwise not binding on the State. DEC surely did not write a 93-page manual and then disclaim that the manual has any effect because DEC defers to whatever EPA says in its past and future guidance documents. That would render the Manual superfluous and would effectively delegate all Alaska decision-making on these issues to EPA. The more plausible construction of the statement in paragraph 1.1 is that DEC informed participants in the risk assessment process that they could continue to refer to EPA guidance, particularly on topics that are not addressed in Alaska's 2000 Manual. But Alaska did not cede its regulatory authority to people who write EPA

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[15] Division's Opposition Brief at 21.

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guidance documents.

Second, as a source for its statement that in 2000 DEC "followed" EPA's 1989 Guidance, the Division cites paragraph 1.4 of the 2000 Manual.[16] Paragraph 1.4 is a very vague statement which merely *recommends* that risk assessments "generally" follow the "basic procedures" in a list of five EPA documents, including EPA's 1989 Risk Assessment Guidance Manual. Again, the statement in paragraph 1.4 of the 2000 Manual is only a recommendation, and it cannot be reasonably interpreted to *require* that a risk assessment conducted under Alaska law must abide by anything in these five EPA publications.[17]

Third, even if paragraph 1.4's reference to EPA's 1989 Risk Assessment Manual made the 1989 Risk Assessment Manual binding in Alaska, reference to EPA's 1989 Risk Assessment Manual leads nowhere. The issue here is whether DEC is required to base its groundwater cleanup standard for sulfolane on EPA's PPRTV, to the exclusion of all other scientific opinion. In 1989, PPRTVs did not even exist, so EPA's 1989 Risk Assessment Manual does not discuss PPRTVs, much less require their use. Thus, even if EPA's 1989 Risk Assessment Manual was fully incorporated into Alaska law through this convoluted trail, it did not and does not direct anyone to use PPRTVs to set Alaska cleanup standards.

Recognizing that EPA's 1989 Risk Assessment Manual does not take it where it wants to go, the Division argues that because DEC's 2000 Manual "recommended"

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[16] Division's Opposition Brief at 22.

[17] Moreover, a recommendation to follow the "basic procedures" outlined in EPA documents is not the same thing as a directive to accept EPA's substantive scientific judgments.

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reference to the EPA's 1989 Risk Assessment Manual, DEC not only adopted the 1989 EPA Risk Assessment Manual, but it also adopted (through a regulatory blank check) whatever EPA said on this topic in later EPA pronouncements. Specifically, the Division argues that when DEC adopted 18 AAC 75.345(b)(2) in 1999, DEC also prospectively adopted all future EPA guidance documents. According to the Division, this includes an EPA Directive issued four years later, in 2003.[18] This EPA Directive added EPA's PPRTVs into a toxicity value hierarchy. The Division claims that when EPA issued this Directive in 2003, it automatically became a part of Alaska regulatory law, and the Directive now requires DEC to use the EPA PPRTV to determine the cleanup level for sulfolane.[19] The notion that the Division believes the State of Alaska, acting through DEC, has voluntarily surrendered its rulemaking authority to the federal government is remarkable. Although this argument, if accepted, would cause DEC to violate multiple Alaska Statutes (as discussed below), it is also clear that as a matter of policy the Division's position cannot be reconciled with the consistent direction from the Legislature that the State of Alaska - not the federal government - should, whenever possible, make the fundamental decisions affecting

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[18] Human Health Toxicity Values in Superfund Risk Assessments, OSWER Directive 9285.7-53 (December 5, 2003) (Ex. 13 to the Division's brief) ("EPA Directive").

[19] Flint Hills disagrees with this characterization of the 2003 EPA Directive. As Flint Hills pointed out in its opening brief, EPA's 2003 Directive is not mandatory with respect to use of PPRTV values. Although the Directive added PPRTVs to the hierarchy, the 2003 Directive states that "EPA and state personnel may use and accept other technically sound approaches, either on their own initiative, or at the suggestion of potentially responsible parties, or other interested parties. . . . This memorandum does not impose any requirements or obligations on EPA, States, or other federal agencies, or the regulated community." 2003 Directive (Division's Exhibit 13) at page 1.

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Alaska's environment, people, and resources.

B. The Division's Argument that Alaska's Regulations Incorporate EPA's 2003 Guidance Document by Reference Violates the Alaska Administrative Procedure Act, Including AS 44.62.245.

For the reasons just stated, the documents cited by the Division do not carry the weight the Division tries to place on them. On a plain reading, the applicable regulation (18 AAC 75.345(b)(2)) and the referenced 2000 Manual do not state that risk assessments conducted under Alaska law will be governed by whatever guidance documents EPA may adopt in the future, including EPA's 2003 Directive. In any event, if that is what 18 AAC 75.345(b)(2) says, the result is illegal, under AS 44.62.245.[20] This statute closely regulates incorporation of future matters into regulation by reference. To incorporate a *future* document into a regulation by reference, AS 44.62.245 imposes several specific requirements. None of these requirements are satisfied here.

First, AS 44.62.245 says that the regulation as adopted must refer to the document or material and use the phrase "as may be amended" or a similar phrase. Here, 18 AAC 75.345(b)(2) does not use the above-quoted language or its equivalent. This regulation only refers to DEC's 2000 Manual, and the regulation does not have language stating that future amendments to DEC's 2000 Manual will be automatically incorporated. Similarly, the 2000 Manual also does not use any phrase that indicates that "future" EPA guidance will apply or will become automatically incorporated into Alaska's regulations when adopted. To the contrary, the 2000 Manual states that it will be updated as needed "through the public review process *as a regulatory*

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[20] A copy of AS 44.62.245 is included in Appendix A to this brief.

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amendment." 2000 Manual, page i, and paragraph 1.4 (at page 4) (emphasis added). Thus, the Manual itself rejects any notion that it can be amended in the future through surreptitious incorporation of EPA edicts. The Manual specifies that future amendments to the Manual will only be made by means of rulemaking in accordance with the Alaska Administrative Procedure Act.

Second, AS 44.62.245(a) says that future material that is incorporated by reference must fall in one of two categories. The future material must either be a "regulation of another agency of the state," or an Alaska statute must expressly authorize the incorporation of the future document. The 2003 EPA Directive adding PPRTVs to the hierarchy does not fall within either of these categories.

Third, when the amended future version of an incorporated document becomes available, the agency must follow the procedures in AS 44.62.245(b) and (c), involving notice to the public and posting. DEC does not claim that it followed any of these procedures with respect to the 2003 EPA Directive. In short, EPA's 2003 Directive simply is not part of Alaska law.

III. THE DIVISION'S ADOPTION OF EPA GUIDANCE TO GOVERN ITS DECISION VIOLATES THE MANDATE IN AS 46.03.024.

In addition to violating Alaska's rulemaking laws, DEC's adoption of a groundwater cleanup standard without any consideration of cost also violates AS 46.03.024.[21] This statute says that when DEC adopts a regulation related to pollution, DEC must give "special attention to public comments concerning the cost of compliance with the regulation and to alternate practical methods of complying with

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[21] A copy of AS 46.03.024 is included in Appendix A.

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the statute being interpreted or implemented by the regulation." This mandate applies whether DEC adopts a cleanup standard by regulation into Table C at 18 AAC 75.345 or through incorporation in the 2000 Manual. If DEC uses the process contemplated under the 2000 Manual, that process itself must conform to the mandates of 46.03.024. Specifically, Flint Hills and the public must be provided an opportunity to provide comments concerning the cost of DEC's proposed standard and alternative methods of compliance. In this case, DEC did not solicit feedback from the public on these important issues nor did it provide a rigorous analysis examining the costs of compliance, including for alternative approaches such as the cleanup level proposed by Flint Hills.[22]

Flint Hills also notes that if EPA's guidance documents, "directives" and other edicts are automatically imported into Alaska law through the "future reference" method that is advocated by the Division here, the EPA-generated "regulations" never undergo any kind of public review process in Alaska. And specifically, EPA's directives and other edicts are never subjected to comments and evaluation to assess cost of compliance and alternative methods of achieving the desired goals, as required

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[22] In its Opposition to Flint Hills' Motion for Stay at p. 18-19, the Division indicates that it supports a "flexible approach" to the cleanup and that Flint Hills will be "empowered" to evaluate a wide range of alternatives, including "no cleanup at all." While Flint Hills appreciates the Division's assurances that the cleanup will be an accommodating process and that DEC will heed its regulatory mandate that selected remedial actions must be "practicable," these points do not address the more basic point that the Legislature has ordered DEC to pay special attention to costs and alternative methods of compliance in setting the cleanup standards themselves. Flint Hills understands that there is a process to determine to the extent to which an otherwise applicable standard may be modified, if at all, in developing remedial alternatives. However, that question is different than the basic question of what the standard should be in the first instance.

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by AS 46.03.024. The Commissioner should not endorse this end-run around Alaska regulatory process and should require DEC to conduct a rigorous cost/benefit analysis of compliance with the cleanup standard and a cost/benefit analysis of alternative approaches to protecting public health, including the cleanup standard proposed by Flint Hills.

IV. THE DIVISION HAS NOT DEFENDED THE MERITS OF DEC'S DECISION ON THE GROUNDWATER CLEANUP LEVEL FOR SULFOLANE

The Division has elected to resist a hearing on two limited legal grounds: that its choice of a groundwater cleanup level was not a "final decision", and that its regulations incorporated a 2003 EPA Directive which required the Division to use EPA's PPRTV values exclusively to determine a groundwater cleanup level. If those arguments fail, as they should, the Division offers no opposition to the requested hearing.

The Division repeatedly asserts that there are no "material" issue of fact to be addressed at a hearing, but this assertion is premised entirely on the Division's erroneous argument that its regulations compelled it to use EPA's PPRTV as the sole basis for making its groundwater cleanup decision. Upon recognition that DEC should be reviewing all of the scientific data in a robust fashion, and should not restrict its view to one EPA document, there are clearly disputed issues regarding the cleanup level, as thoroughly discussed in Flint Hills' opening memorandum and clearly set forth in the HHRA document submitted by Flint Hills.

Unfortunately, the Division disparages the notion of a hearing where the views of experts are considered. This unwillingness to even *consider* other scientific opinions is disturbingly similar to DEC's strange insistence that Flint Hills must strike

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all materials from the HHRA that support a groundwater cleanup level that is different from the one that DEC wants to impose. Flint Hills respectfully submits that an open dialogue about the merits of this issue is exactly what is needed. This dialogue could have occurred before this matter reached the stage of formal hearings, but DEC insisted on prematurely adopting a groundwater cleanup level based solely on the EPA PPRTV toxicity values, and DEC has adamantly refused to consider any alternatives. As a result, Flint Hills must ask the Commissioner to use the adjudicatory hearing process to allow a full presentation of scientific opinions regarding the appropriate groundwater cleanup level for sulfolane under 18 AAC 75.345(b)(2).[23]

V. THERE IS TIME TO MAKE A CAREFUL DECISION ON THE CORRECT SULFOLANE CLEANUP LEVEL

The Division's opposition to the proposed stay urges the Commissioner to

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[23] In addition to the Division's response, several other commenters responded to DEC's invitation and submitted comments regarding Flint Hills' Request for a Hearing. For the most part, these comments reflect the opinions of the commenters about their desired outcome of the process, but do not address the specific legal or factual issues raised by Flint Hills' request. Flint Hills notes two specific responses. 1) Mr. Kasanke asserts that Texas has set a Protective Concentration Level for sulfolane at .49 ppb. He is incorrect. In June 2012, after reviewing studies concerning the toxicity of sulfolane, the Texas Commission on Environmental Quality adopted a Protective Concentration Level for residential groundwater at 320 ug/L, which is similar to the level of 362 ug/L proposed by ARCADIS and Flint Hills. 2) An EPA employee in Seattle submitted a letter indicating that she spoke to an EPA employee who worked on the PPRTV for sulfolane. The commentator reports that this individual defended EPA's methodology on the sulfolane PPRTV. It is not surprising that the EPA employee defended the quality of his work. That does not mean that a hearing is not warranted to consider other scientific opinions, especially in light of the fact that a number of regulatory authorities and scientists (including ARCADIS) have arrived at toxicity values considerably higher than EPA. See Flint Hills' Opening Brief at pp. 28-29.

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make a quick decision to fully implement the 14 ug/L sulfolane cleanup standard. In doing so, the Division blurs the distinction between two different categories of activity.[24] The first category involves interim measures to protect potential receptors from harm, and minimize spread of sulfolane from the refinery site.[25] The second category involves measures to address the long term cleanup of the site; this work is focused on the development of the various cleanup-related deliverables such as site characterization reports and feasibility studies. Flint Hills has only proposed to stay deadlines for filing various plans and reports in the second category, related to the long-term cleanup of the site. The requested stay is not aimed at the first category.

The question facing the Commissioner is whether work on the long term cleanup-related deliverables should continue during this review of the sulfolane cleanup standard. Flint Hill respectfully believes that the Commissioner's evaluation of the stay request should be driven by two key questions.

First, will potential receptors be protected during the pendency of the stay? The answer is categorically "yes" because Flint Hills has committed that alternative water solutions ("AWS") will be provided to residents affected by the plume (for purposes of the AWS, affected residents are those with any groundwater well result

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[24] The Division's brief opposing Flint Hills' stay request contains a wide range of material misstatements and assertions. Flint Hills has very different perspectives on many of these points, but in the interest of brevity, Flint Hills is not addressing most of these issues here. Flint Hills would be happy to provide a response to the Division's stay brief if the Commissioner wants to consider a more extensive reply.

[25] Note that in its opening brief in support of its Request for Hearing, Flint Hills inadvertently described the refinery as being located on "240 acres just outside the city limits of North Pole." Opening Brief at p. 2. In fact, the refinery property is located within the North Pole city limits.

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above non-detect) and those on the plume boundary.[26] The plume will continue to be monitored per plans previously reviewed by DEC, and if additional residents or establishments are impacted by sulfolane contamination in the plume, they will be protected with alternative water solutions, even if the measured levels of sulfolane are below the cleanup level currently proposed by DEC.

Second, will granting the stay delay the implementation of measures to prevent sulfolane from migrating off the refinery property? The answer to this question is "no" because the remedial measures to stop sulfolane migration in the short term were previously initiated, and they will continue, even if the stay is granted.[27] Flint Hills significantly upgraded its groundwater treatment system in 2013. The purpose of the system is to remove sulfolane from groundwater before the groundwater moves off-site. Flint Hills' actions have resulted in a remediation system that captures and treats the vast majority of sulfolane in the groundwater coming from the sources on the refinery property. The system is effectively preventing the migration of sulfolane within the capture zone of the wells. New wells that are designed to capture the remaining western edge of the onsite plume are scheduled to begin operation in just

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[26] Note that this is an "immediate" response as required by the regulations upon the discovery of contamination. 18 AAC 75.310. Whether AWS will continue after final remedy decisions are made will depend on the ACL chosen. Flint Hills undertook this immediate response despite the fact that its liability for the release causing the contamination is in question. Flint Hills prepared an AWS Program Management Plan dated December 2013 based on DEC input to guide the continued implementation of the alternative water solutions.

[27] The current and pending groundwater remediation systems were conservatively designed to capture and treat groundwater with sulfolane concentrations at and above 14 ppb.

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four months. Flint Hills' experts in subsurface water movement believe that once these new wells are operational, the groundwater treatment system will effectively eliminate the migration of sulfolane from the historic areas of release.[28]

These two initiatives (providing an AWS to all affected properties and the groundwater capture system) provide the Commissioner a strong basis for concluding that public health and the environment will be protected pending determination of an appropriate cleanup standard.

Flint Hills emphasizes two points in relation to the Division's views on the cleanup-related deliverables.

First, the Division treats interim "on-the-ground" measures (such as those described above) and long-term remedial measures in the same fashion, suggesting they both play a crucial role in protecting public health and the environment in the short term -- today, tomorrow, next month.[29] The cleanup deliverables serve an important purpose, which is long term development of the remedial action, but the generation of these deliverables plays little, if any, role in protecting public health and the environment in the short term.

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[28] Note that these experts (including hydrogeologists and geochemists) have been studying this site, including the massive amount of data gathered, for the last 3-4 years.

[29] The Division's position in opposing the stay request is at odds with the Division's position in opposing the hearing request. In opposing the stay request, the Division argues that the long-term cleanup deliverables are crucial documents that should not be delayed. Yet, in opposing the hearing request, the Division argues that the final determination of an appropriate groundwater cleanup standard for sulfolane -- the most important step in the remedial process and critical to the development of every deliverable -- should be deferred for an indeterminate length of time. See Division's Opposition to Hearing Brief at pp. 15-17.

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Second, the Division fails to acknowledge the broader, significant harm that has resulted, and which will continue and worsen, from DEC's premature adoption of a sulfolane cleanup standard. The harm in this case is not simply wasting resources generating deliverables that may have to be re-done at a later point. Rather, as is evident in some of the public comments on the hearing request, members of the public harbor strongly held beliefs that public health is threatened and that property values are impaired. These beliefs have not been formed in the abstract, but flow from the public's belief that harmful levels of sulfolane exist in their drinking water and beneath their properties. Moving forward with the cleanup deliverables before the sulfolane cleanup level is finally resolved will worsen these harms by prematurely entrenching the 14 ug/L standard in these documents and in the minds of the public, making it even more difficult to adopt an appropriate standard supported by good science and applicable laws and regulations.

In sum, the groundwater cleanup level will drive future remedial decision-making, and play an outsized role in shaping the public's and marketplace's views on the nature and extent of the sulfolane problem in North Pole. This is an important decision, and DEC must get it right. Despite the Division's suggestions to the contrary, this is not a crisis situation. There is time to address the issue in an adjudicatory hearing. In the meantime, the cleanup-related deliverables necessary to determine the correct and final long-term cleanup approach should be deferred because the interim measures underway and planned for this year are effective to protect potential receptors and capture sulfolane from all sources on the property. After the sulfolane cleanup standard is fully addressed and resolved, the remedial process can proceed in a rational way, without wasted efforts or increased risk to the

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public.

CONCLUSION

Neither sound science nor Alaska regulatory laws support the Division's opposition to an adjudicatory hearing to determine the groundwater cleanup level for sulfolane at the North Pole Refinery site. The groundwater cleanup level for sulfolane should be developed by careful and thorough consideration of the available scientific information, not by reflexive adoption of a single value supplied by EPA. Flint Hills respectfully urges the Commissioner to grant its Request for Adjudicatory Hearing.

DATED: February 18, 2014.

PERKINS COIE LLP
ATTORNEYS FOR REQUESTOR
FLINT HILLS RESOURCES ALASKA, LLC

By: _____
Eric B. Fjelstad
Alaska Bar No. 9505020
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APPENDIX A

AS 44.62.245 Material incorporated by reference.

(a) In adopting a regulation that incorporates a document or other material by reference, a state agency may incorporate future amended versions of the document or other material if the adopted regulation identifies or refers to the document or other material followed by the phrase "as may be amended," the phrase "as amended from time to time," or a similar provision and the

(1) document consists of a regulation of another agency of the state; or

(2) incorporation of a future amended version of the document or other material is explicitly authorized by a statute.

(b) When the amended version of a document or other material incorporated by reference in a regulation as described in (a) of this section becomes available, the state agency shall

(1) make the amended version of the document or other material available to the public for review; and

(2) post on the Alaska Online Public Notice System and publish in a newspaper of general circulation or trade or industry publication or in a regularly published agency newsletter or similar printed publication, not later than 15 days after the amended version of the document or other material

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becomes available, a notice that describes the affected regulation, the effective date of the amended version of the document or other material, and how a copy of the amended version may be obtained or reviewed.

(c) The state agency shall also send the notice described in (b)(2) of this section to

(1) a person who has placed the person's name on a distribution list kept by the agency that lists persons who want to receive the notice; the agency may allow a person to request that distribution of the notice be by electronic means and shall honor that request if appropriate means are available; and

(2) the regulations attorney in the Department of Law.

(d) A change in the form, format, or title in a future amended or revised version of a document or material incorporated by reference in a regulation under this section does not affect the validity of the regulation or the state agency's ability to enforce or implement the regulation. The state agency shall notify the regulations attorney in the Department of Law if the title of the document or other material changes. The regulations attorney shall correct the title in the Alaska Administrative Code under AS 44.62.125.

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AS 46.03.024. Consideration in adopting pollution regulations.

Notwithstanding another provision of law to the contrary, when adopting a regulation relating to the control, prevention, and abatement of air, water, or land or subsurface land pollution, the department shall give special attention to public comments concerning the cost of compliance with the regulation and to alternate practical methods of complying with the statute being interpreted or implemented by the regulation.

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Exhibit F

From: Cardona, Tamara (DEC) [mailto:tamara.cardona@alaska.gov]
Sent: Thursday, December 26, 2013 4:23 PM
To: Smith, David (KR&ES)
Cc: Garner, Loren G; Bainbridge, Steven T (DEC)
Subject: RE: On & Off-Site Site Characterization Reports Uploaded

Dave,

We have received the reports dated December 20, 2013, and noted that Flint Hills has used an alternate cleanup level (ACL) for sulfolane of 362 ppb. This is not an approved ACL therefore the On-Site and Off-Site Site Characterization Reports are rejected as submitted. DEC requests that the reports be revised using the established ACL of 14 ppb by January 6th, 2014. Failure to submit these revised reports will be considered as failure to submit the deliverables per DEC's communication from July 23, 2013.

Thank you.

Tamara

Tamara Cardona, PhD
Contaminated Sites Program
Alaska Department of Environmental Conservation
907-451-2192

From: Smith, David (KR&ES) [mailto:SMITH53D@KOCHIND.COM]
Sent: Friday, December 20, 2013 4:13 PM
To: Cardona, Tamara (DEC)
Cc: Garner, Loren G
Subject: On & Off-Site Site Characterization Reports Uploaded

Hi Tamara,

A quick note to let you know that the On- & Off-Site Site Characterization Reports have been uploaded to ADEC's Sharepoint site at this location:

Site Characterization & Remediation/Site Characterization Work Plans and Reports/Annual Folders/2013 Work Plan(s)/ Offsite Site Characterization Report – 2013 Addendum, and Onsite Site Characterization Report – 2013 Addendum

Full copies are being sent out via overnight courier.

Loren & I both hope you have a happy holiday next week.

Dave
David A. Smith
Koch Remediation & Environmental Services
316.828.8496

BEFORE THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION FOR THE STATE OF ALASKA

FLINT HILLS RESOURCES ALASKA, LLC, Requestor, v. ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF SPILL PREVENTION AND RESPONSE, Respondent.	DEC File No. 100.38.090

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Kim Parran, being first duly sworn, deposes and says: I am employed by the law firm of Perkins Coie LLP in the Municipality of Anchorage. On February 18, 2014, I served a true and correct copy of FLINT HILLS RESOURCES' REPLY IN SUPPORT OF ITS REQUEST FOR AN ADJUDICATORY HEARING on the following by Email and U.S. Mail:

PERKINS COIE LLP
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Commissioner Larry Hartig
Department of Environmental Conservation
410 Willoughby Ave., Ste. 303
P.O. Box 111800
Juneau, AK 99811-1800

Steve Bainbridge
Division of Spill Prevention and Response
Contaminated Sites Program
555 Cordova Street
Anchorage, AK 99501-2617

Gary Mendivil
Office of the Commissioner
Department of Environmental Conservation
410 Willoughby Ave., Ste. 303
P.O. Box 111800
Juneau, AK 99811-1800
(courtesy copy)

Lauri Adams
Office of the Attorney General
Environmental Conservation Section
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501

DATED: February 18, 2014.

Kim Parran

SUBSCRIBED AND SWORN TO OR AFFIRMED before me on February 18, 2014.

Notary Public in and for Alaska
My commission expires: 10/3/2015

MARCIE L. CRAIG NOTARY PUBLIC STATE OF ALASKA

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